National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: August 21, 1996

TO: John D. Nelson, Regional Director, Region 19

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Vanalco, Inc., Case 36-CA-7612

This Section 8(a)(1)(2)(3) and (5) case was submitted for advice on whether the Employer's safety committee is a Section 2(5) labor organization under Electromation,[(1)] and if so whether the Employer provided unlawful assistance by paying employees for meeting and by providing meeting space.

In 1978, the state of Washington enacted a section of the State Administrative Code requiring employers with 11 or more employees to have a safety and health committee. The code sets forth the manner in which committee members are to be selected, the terms of the members and procedures for filling vacancies, the ratio of the number of employee-selected and employer-selected members, and committee meeting requirements. The code also sets forth the issues required to be addressed at committee meetings. The code specifically requires the safety committee to review safety and health inspection reports in order to assist in the correction of identified unsafe conditions; to evaluate accident investigations in order to determine if the causes involved were properly identified and corrected; and to evaluate accident and illness programs and discuss recommendations for improvement.

The Employer has had a safety committee since at least 1990. The current safety committee is intended to be in compliance with the state code and is composed of 10 employee members and three Employer members. It appears that employee members are either elected or appointed by their fellow employees. However, at least one employee member, the current committee chairman, was appointed to serve by his committee coordinator.

A review of safety committee meeting documents revealed that the committee met several times a month and discussed the safety of numerous working conditions. It appears that the Employer-selected members functioned as regular committee members and did not function as Employer representatives, i.e., did not address or raise subject matters on behalf of the Employer. Instead, the committee made specific recommendations which an Employer representative outside the committee either denied or agreed with and acted upon. For example, during January 1994 the committee recommended that the Employer do sampling tests for asbestos and contaminated water, and the Employer agreed to perform those tests. In February the committee's recommendation for additional crane and forklift training for new hires was denied. In April the committee's recommendation regarding hazardous gas was denied, but its recommendation for sun visors was accepted. Sometimes the Employer agreed in part and denied in part the committee's recommendations. For example, in August 1994, the Employer accepted in part the committee's recommendation for certain protective equipment.[(2)]

We conclude, in agreement with the Region, that the committee is a Section 2(5) labor organization.

The Board and the courts have generally taken an expansive view of what constitutes a labor organization under Section 2(5).[(3)]

In Electromation, supra , the Board found that the three essential elements which must be present to support such a conclusion are that: (1) employees participate in the organization or committee; (2) the committee exists for the purpose, in whole or in part, of "dealing with" the employer; and (3) these dealings concern conditions of work or other statutory subjects such as grievances, labor disputes, wages, rates of pay, or hours of employment. A fourth element may require showing that the employees are acting in a representational capacity, because Section 2(5) defines a labor organization as including an "employee representation committee" (emphasis added). In Electromation, the Board found that an employee committee was

"representational" and thus found it unnecessary "to determine whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of the other employees." Id., at 994, note 20.

In NLRB v. Cabot Carbon Co., supra, the Supreme Court held that the term "dealing with" is not synonymous with the more limited term "bargaining with," but rather must be interpreted broadly. The "dealing with" requirement is satisfied by any consultations between an employer and a representative group of its employees that look toward the resolution of grievances or the improvement of terms and conditions of employment. Subsequent to Cabot Carbon, the Board has held the following to be labor organizations: an employee council which discussed with management proposals for employees' facilities and fringe benefits;[(4)] a personnel committee which mediated grievances and made recommendations to the employer on working conditions and grievances;[(5)] and an employee action committee which functioned to improve working conditions and served as a communication conduit between the employees and the employer.[(6)] In contrast, the Board has found the following not to be labor organizations because they were intended to perform a management function and not interact with management: employee teams which were designed to perform certain employer-related tasks;[(7)] and employee grievance committees which served to adjudicate or decide employee grievances without making recommendations or proposals to the employer.[(8)]

In E.I. Du Pont & Co.,[(9)] the Board explained that "dealing" involves a "bilateral mechanism," i.e., "a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."

In the instant case, the safety committee meets all of the criteria for a Section 2(5) labor organization. First, employees clearly participate in the committee. Second, the committee also exists to "deal with" the Employer. The committee considered and evaluated employee safety proposals and then made recommendations concerning those proposals to the Employer, who responded by accepting or denying those proposals.[(10)] Third, the subject of those proposals, safety, is a mandatory subject.[(11)]

We note that in E.I. du Pont, the Board found that, although the employer violated the Act by creating and dealing with safety committees, its participation in "safety conferences" was not similarly unlawful because the conferences amounted to "brainstorming sessions where employees were encouraged to talk about their experiences with certain safety issues and to develop ideas and suggestions" and did not have "the task of deciding on proposals for improved safety conditions."[(12)] In the instant case, however, the safety committee engaged in the same types of activities that established a labor organization in E.I.du Pont: the committee members discussed proposals and decided whether to reject the proposals or to recommend them to the Employer. Thus, there was a "bilateral mechanism" for dealings between the Employer and the committee.

Moreover, while it is not clear to what extent, if any, employee committee members must serve in a representational capacity in order for the committee to constitute a 2(5) labor organization,[(13)] it is clear that the members of the committee in the instant case serve in such a representational capacity. Employee members are either elected or appointed by their fellow employees. For all of the above reasons, we conclude that the safety committee is a Section 2(5) labor organization.

We also conclude that the Employer in this case did not unlawfully assist the committee in violation of Section 8(a)(2) because (1) the Employer's provision of minimal financial support was no more than "friendly cooperation;"[(14)] and (2) the Employer appointed representatives on the committee did not otherwise amount to unlawful Employer intrusion into internal union affairs.

The Board has clearly held that the use of company time and property does not per se establish unlawful employer support and assistance.[(15)] The Board has countenanced paid employee time for meeting with the employer where the employee representative group was an independent, dues collecting union, which had been lawfully established and dealt with at arms length.[(16)] In contrast, the Board has sometimes found paid employee time for meeting with the employer together with other administrative support to be unlawful assistance where an employee group had no charter, by-laws or financial independence.

In Duquesne University, the employee committee collected no dues and had no financial independence from the employer. The

committee not only met on the employer's premises on paid time, but also received administrative support from the employer who paid for and distributed the committee's election ballots and also printed and distributed the committee's newsletter. The Board stated: "If the record were devoid of any evidence of assistance but that. . . we would be reluctant to find that evidence sufficient to warrant an unlawful assistance finding due to the special circumstances of this case, i.e., where an employer, here a university, so freely makes available its facilities, time and services to any desirous organization..." The Board proceeded to find unlawful assistance because the employer engaged in numerous other acts of unwarranted interference, viz., the employer's personnel director gave "advice and counsel" to the employee committee; the employer established an oversight committee to act as an "advisory body" to the employee committee; and the vice president acted as an "advisor" to the employee committee.

The Board appears to suggest in Duquesne University that the minimal financial assistance provided in that case would have been unlawful but for the "special circumstances" there, i.e., that the university made its space and services freely available to other organizations.[(17)] Other Board cases, however, suggest that the provision of the minimal financial support noted in Duquesne University may be lawful even absent mitigating "special circumstances."

In Janesville Products Div., Amtel Inc., 240 NLRB 854 (1979), the employer established outside the Section 10(b) period an employee council of five elected members. The council had no charter and collected no dues. The council met regularly on the employer's premises during paid employee time, and minutes of the meetings were prepared at the employer's expense. The employer also provided administrative support for the council's elections by providing ballots and allowing the election during paid time. The ALJ, adopted by the Board, noted that this amount of financial support, standing alone, would not have constituted unlawful assistance. Although the ALJ cited Duquesne University supra, he did not refer to any "special circumstances" in support of his conclusion. The ALJ proceeded to find a violation based upon additional conduct, viz., the employer's intrusion into the council's structure by successfully persuading the council to increase its size, and by successfully persuading the council to hold an election on a specified date.

In Kaiser Foundation Hospitals, 223 NLRB 322 (1976), the employer dealt with a Registered Nurses Representation Committee (committee) which had a constitution and by-laws but otherwise was a wholly internal union which did not appear to be financially independent. The committee met on the employer's premises on paid time, and employees attended meetings without obtaining prior approval from the employer. The employer also provided administrative support in the form of the use of typewriters, a copying machine, bulletin boards, and the employer's loudspeaker system. The ALJ found this minimal support did not "undermine the freedom of choice and independence of the employees in dealing with their employer." Id. at 326.

Although the Board disagreed and found unlawful assistance, the Board focused not on the above provision of minimal support, but instead upon the employer's provision of clear assistance at two committee meetings. The Board explicitly relied upon the fact that at one meeting employer managers attended and openly encouraged employee participation in the committee's activities, and at the second meeting, another employer manager participated in the discussion of terms and condition of employment, after a Board petition had been filed, in violation of the Board's Midwest Piping doctrine. The Board stated: "Contrary to the Administrative Law Judge, we find that these acts of assistance rendered to the Committee by Respondent exceeded the bounds of permissible cooperation and constituted unlawful aid and assistance." (emphasis added).

We conclude in this case that the minimal support provided to the safety committee did not amount to unlawful assistance even if "special circumstances" comparable to those in Duquesne University are required to be present.

First, the minimal financial and administrative support provided to the non-independent committee here was not meaningfully different from the levels of support found to constitute "friendly cooperation" which was given to the similarly situated non-independent unions in Janesville Products, and Kaiser Foundation. In those cases as here, the providing of committee meetings on premises on paid time, with minimal attendant administrative support, was not viewed as coercive of employee free choice even in the absence of any "special circumstances."[(18)]

However, to the extent that "special circumstances" may be required for the provision of such minimal support to a non-independent union, we note that they are also present in this case.

The safety committee here, established sometime outside the 10(b) period, was mandated by the Washington State Administrative Code. There is no evidence that when the Employer initially set up the committee it took full responsibility and employees were not then aware of the mandate of the state code. Nor is there any evidence that employees currently are not fully aware that the instant committee, its structure and meeting requirements, are followed in compliance with the state code. In addition, the Employer asserts that its payment of employees while sitting on the committee is also required by both federal and state wage and hour laws.(19) In sum, this is hardly a case where an employer initiated the establishment of a safety committee and paid employees for meeting thereon.

We also note that the committee was comprised of seven selected employee representatives and three Employer selected representatives. There is no evidence that the Employer representatives were statutory supervisors. However, even assuming that they were low level supervisors, or that their status as Employer-selected representatives otherwise made them Employer agents, we conclude that their mere participation on the committee did not constitute unlawful interference.

Section 8(a)(2) interference in the administration of a union may be found from a supervisor's participation in internal union affairs.(20) In Power Piping, the Board held that the involvement of even high level supervisors would not in and of itself create a conflict of interest and be unlawful. Rather, the Board would evaluate all the circumstances including the supervisors' positions in the employer's management hierarchy, the "permanence" of their supervisory status, and the nature of their involvement in union activities to determine whether there was unlawful employer participation.(21)

In the instant case, the Employer appointed committee members did not act as Employer representatives and did not "deal with" the other committee members in that capacity.(22) Rather, the Employer selected members functioned merely as regular committee members who discussed whether to bring safety matters to the Employer's attention. Moreover, according to the committee structure mandated by the state code, their status was temporary and ended after one year. In these circumstances, their mere participation in the discussion and their voting upon what matters to propose to higher Employer management was not unlawful interference.

Accordingly, the Region should dismiss this charge, absent withdrawal, because the Employer's provision of minimal financial and administrative support did not amount to unlawful interference coercing employees from exercising their Section 7 rights.

B.J.K.

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[1] 309 NLRB 990 (1992).

[2] A review of the summaries of all the meetings of 1994 and 1995 revealed that the committee made recommendations on 36 work safety items. The Employer fully or partially accepted 24 of these and denied outright the other 12.

[3] NLRB v. Cabot Carbon Co., 260 U.S. 203 (1959); Ona Corporation, a Division of Onan Corporation, 285 NLRB 400 (1987); American Tara Corporation, 242 NLRB 1230, 1241 (1979).

[4] St. Vincent's Hospital, 244 NLRB 84, 86 (1979).

[5] Predicasts, Inc., 270 NLRB 1117, 1122 (1984).

[6] Ona Corporation, supra.

[7] General Foods Corporation, 231 NLRB 1232 (1977).

[8] Mercy-Memorial Hospital Corporation, 231 NLRB 1108 (1977); Sparks Nuggett, Inc. d/b/a John Ascuaga's Nuggett, 230 NLRB 275 (1977).

[9] 311 NLRB 893, 894 (1993).

[10] See, e.g., Ona Corp., 285 NLRB 400, 405)1987) (employee action committee made proposals regarding vacations and floating holiday schedules); St. Vincent's Hospital, 244 NLRB 84, 85-86 (1979) (employee committee made proposals on several issues including wages, hours and vacations); Ampex Corp., 168 NLRB 742, 746-47 (1967), enfd. 442 F.2d 82 (7th Cir. 1971), cert. denied 404 U.S. 939 (1971) (committee presented suggestions to the employer on behalf of all employees as to subjects pertaining to working conditions).

[11] E.I. du Pont, supra, 311 NLRB at 894. In Salt Lake Division, Waste Management of Utah, 310 NLRB 883 (1993), the Board stated that safety "might under other circumstances" be a subject that would place a committee "outside the ambit of Section 8(a)(2)." However, the Board nonetheless held that the employer violated Section 8(a)(2) in establishing and dealing with a committee that addressed, inter alia, safety concerns. Thus, the Board's comment about "other circumstances" is dictum and is outweighed by the Board's subsequent decision in E.I.du Pont that the employer's creation and domination of safety committees violated Section 8(a)(2).

[12] E.I. du Pont, supra, 311 NLRB at 894.

[13] See Electromation, supra, 309 NLRB at 994, note 20. Member Devaney, in his concurring opinion, looks to the committee's authority, that is, whether it has been empowered by the employer or the employees to speak for other employees. 309 NLRB at 1002.

[14] Duquesne University of the Holy Ghost, 198 NLRB 891 (1972).

[15] See, e.g., BASF Wyandotte Corp., 274 NLRB 978, 980 (1985).

[16] See, e.g., Coamo Knitting Mills, 150 NLRB 579 (1964); Sunnen Products, Inc., 189 NLRB 826 (1971).

[17] See also Signal Oil and Gas Co., 131 NLRB 1427 (1961) where similar minimal support in the form of paid employee time and administrative assistance was provided to a similar non-independent union which had collected no dues. There the Board adopted the dismissal conclusion of the ALJ who noted that the employer had made its facilities available to other organizations such as the bowling league and the employees credit union. Thus Signal Oil and Gas also arguably suggests that such minimal financial support for a non-independent union may be unlawful absent some mitigating "special circumstances."

[18] The violations found in those cases were based upon additional assistance which is absent here.

[19] See 29 CFR Sections 785.27 et seq.

[20] See generally Power Piping Co., 291 NLRB 494 (1988) reaffirming Nassau & Suffolk contractors' Assn. 118 NLRB 174 (1957), where the Board discussed criteria for supervisory employees who are employer agents and also union members to participate in union affairs without interfering in the administration of the union.

[21] In Power Piping itself, the Board found no violation where the general foreman, who was third in command at the plant, voted in an internal union election where the foreman would revert to journeyman status when his assignment was completed.

[22] Cf. E.I. du Pont & Co, 311 NLRB 893 (1993) where the employer members of the safety committees clearly represented the employer and "dealt with" the other employee committee members. This conduct established those committees as Section 2(5) labor organizations.